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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARION D. CAMPBELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Marion D. Campbell hereby replies to the arguments presented by the United States in opposition to his petition for a writ of certiorari.

1. The underlying question in this case is whether the court of appeals erred in applying the "totality of the circumstances" test to find that the Hobbs Act conspiracy of which Petitioner was acquitted and the drug conspiracy on which the jury failed to reach a verdict constituted separate conspiracies. The United States does not directly challenge Petitioner's criticism of the court of appeals' application of the "totality of the circumstances" test. *See* Pet. Br. at 9-11. Instead, the United States

confines itself to two points. First, the United States cites several cases for the position that "[t]he 'totality of the circumstances' test that the courts below applied . . . is not materially different from the test used by the other circuits." U.S. Br. at 9 n.3. But, Petitioner conceded that, *in form of words*, the Sixth Circuit's test is similar to that used elsewhere in the country. The point, however, is that the Sixth Circuit departed from accepted practice in *applying* this test. The cases cited by the United States only emphasize this difference in application. Although some of the cases cited found allegations of separate conspiracies, all of those cases involved strong indicia of separate conspiracies which are not present here. *See, e.g., United States* v. *Ciancaglini*, No. 88-1438 (3d Cir. Oct. 13, 1988) (only insignificant overlap in time and overt acts). *United States* v. *Korfant*, 771 F.2d 660, 662-63 (2d Cir. 1985) (no meaningful overlap in persons, places or overt acts). By contrast, where, as here, there has been no significant difference between the allegations, the courts have found a single conspiracy. *E.g., United States* v. *Castro*, 629 F.2d 456, 461-64 (7th Cir. 1980); *United States* v. *Marable*, 578 F.2d 151, 154-56 (5th Cir. 1978).

For the most part, the United States attempts to avoid entirely the totality of the circumstances test by simply asserting that "the evidence in this case established two separate agreements." U.S. Br. at 8. Specifically, the United States asserts that Petitioner was engaged in a conspiracy to distribute drugs *before* the alleged extortion conspiracy took shape. *Id.* at 8-9; *see also id.* at 11. However, all of the evidence adduced in support of the alleged drug conspiracy relates to events which took place *before* January 1, 1985. *See* U.S. Br. at 3. This evidence could not have been considered to show, as the original indictment alleged, that Petitioner was engaged in a separate conspiracy to distribute drugs between January 1, 1985 and February 11, 1985. Docket Entry

1. The United States does not and cannot cite any evidence that *during the time period alleged in the original indictment*, there were separate conspiracies to violate the Hobbs Act and to possess drugs with intent to distribute.

The United States' attempt to use evidence of earlier events to demonstrate separate conspiracies starkly illustrates the attack that this case poses upon the individual protections afforded by the Double Jeopardy Clause. The initial indictment in this case proceeded on the theory of a single conspiracy, during a single time period, to distribute drugs and to violate the Hobbs Act. The evidence developed at trial showed that Petitioner did not engage in this single conspiracy, but suggested that a drug conspiracy may in fact have existed prior to the Hobbs Act conspiracy. Following Petitioner's acquittal, the Government now seeks to retry him under the theory of separate conspiracies suggested by the evidence developed during its first case. This practice squarely violates "the principles of finality and prevention of prosecutorial overreaching" that the Double Jeopardy Clause was designed to protect. *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). If the United States is permitted to use an initial trial in order to refine its case for retrial, Petitioner would be unfairly "subject[ed] . . . to embarrassment, expense and ordeal and compell[ed] to live in a continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U.S. 184, 187-88 (1957); *cf. Sanabria* v. *United States*, 437 U.S. 54, 73 (1978) ("[t]he Government having charged only a single gambling business, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the 'same offense.' "). This Court should grant a writ of certiorari in order to protect the Double Jeopardy Clause from such erosion.

2. As the United States acknowledges, a defendant may not be prosecuted under two separate statutes for the same course of action unless "each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). The United States attempts to dismiss the relevance of *Blockburger* to this case by observing that a violation of either the Hobbs Act or Section 846 may sometimes be established without showing a violation of the other. U.S. Br. at 7, 10. This argument, however, ignores *Illinois* v. *Vitale*, 447 U.S. 410 (1980) and *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), both of which established that, in applying *Blockburger*, the court must focus only on the conduct which the Government has *alleged* to satisfy the elements of the statute in question—even if the statute may be violated by any of several means. *See also Whalen* v. *United States*, 445 U.S. 684, 691-92 (1980). Thus, the relevant question here is whether, under the theory used by the Government in this case, proof of Petitioner's participation in a Hobbs Act conspiracy would also constitute proof of a conspiracy to violate Section 846.

The United States further argues that, even focusing only on the conduct alleged in this case, the proof necessary to convict under the Hobbs Act would not necessarily establish a violation of Section 846. U.S. Br. at 10-11. The United States' analysis on this point is, however, erroneous. First, the conspiracy alleged under the Hobbs Act is the same as that alleged under Section 846. *See* Pet. 11-18. Second, proof that Petitioner conspired to affect interstate commerce by protecting Special Agent McNeal's operation to distribute cocaine would fully establish that Petitioner himself conspired to distribute cocaine. Third, this same allegation that Petitioner attempted to obtain a role in Special Agent McNeal's operation would also constitute an effort to possess cocaine as a member of the distribution ring. Thus, the alleged Hobbs Act and Section 846 violations in this case are the

"same offense" under the analysis used in *Vitale* and *Harris*.

3. The United States does not dispute the existence of a conflict among the circuits as to whether a more rigorous standard applies for determining whether two allegations constitute the "same offense" where a case involves successive prosecutions rather than cumulative sentencing. *See* U.S. Br. at 11.[1] The United States asserts, however, that this case does not involve successive prosecutions because the mistrial did not terminate Petitioner's original jeopardy on the Section 846 count. *Id.* at 8, citing *Richardson* v. *United States*, 468 U.S. 317 (1984).[2] This argument simply misses the point. The issue is whether, following acquittal on the Hobbs Act conspiracy, the United States may now recommence Petitioner's prosecution under Section 846. This issue is entirely distinct from the issue of the effect of a mistrial upon retrial of the *same* count that the Court addressed in *Richardson*.[3]

Furthermore, this case is not, as the United States suggests, analogous to *Ohio* v. *Johnson*, 467 U.S. 493

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[1] The United States cites *Garrett* v. *United States*, 471 U.S. 773, 778-79 (1985), apparently for the proposition that *Blockburger* provides the sole test for determining whether two offenses are "the same" in cases of successive prosecution. U.S. Br. at 8. However, this portion of *Garrett* holds only that congressional intent to establish separate offenses is a necessary, but not a sufficient, condition for successive prosecutions. In fact, the *Garrett* Court's contained discussion after its analysis of congressional intent strongly suggests that something more is required in successive prosecution cases. *See Garrett*, 471 U.S. at 786-93.

[2] The United States' further suggestion that this case "does not present a factual basis for resolving" the conflict among the circuits, U.S. Br. at 11, is premised entirely on its erroneous conclusion that the evidence introduced by the Government under the Hobbs Act might not also establish Petitioner's complicity in a drug conspiracy. *See*, p. 4, *supra*.

[3] This distinction was fully recognized by the court of appeals below. Pet. at 9a.

(1984). In *Johnson*, the trial court, over the state's objection, accepted the defendant's guilty pleas to involuntary manslaughter and grand theft and dismissed counts charging him with murder and aggravated robbery. Under these circumstances, the Court held that the Double Jeopardy Clause did not bar the defendant's subsequent trial on the latter charges. The basis for the Court's decision was that "the principles of finality and prevention of prosecutorial overreaching" did not apply because "the State [did not have] the opportunity to marshal its evidence and resources more than once or to have its presentation of the case through a trial." 467 U.S. at 501. Here, by contrast, the unsuccessful effort to prosecute Petitioner under the Hobbs Act has given the United States an unfair opportunity to refine its drug conspiracy case at Petitioner's expense. The concerns for individual rights that underlie the prohibition against multiple prosecutions thus fully apply.

4. In response to Petitioner's showing that his retrial under Section 846 must be barred under principles of collateral estoppel, the United States advances two arguments, both of which must fail. First, the United States asserts that collateral estoppel does not apply because the jury could have found only that Petitioner did not conspire to extort, not that he did not conspire to distribute drugs. U.S. Br. at 12. This argument is premised on the erroneous assumption that the original indictment charged two separate conspiracies. Once that assumption is properly rejected, the United States' argument necessarily fails.

Second, the United States makes the novel assertion that as a matter of law, "the doctrine of collateral estoppel should never bar the retrial of counts that were tried—but did not result in acquittal—before the same jury as the counts giving rise to the collateral estoppel claim." *Id.* at 13. At least as applied to this case, this argument is unsupported either by logic or precedent.

In nearly all of the cases that the United States cites, the courts refused to apply collateral estoppel where a jury had previously inconsistently acquitted a defendant on one count and *convicted* him on another, and the conviction was later vacated on legal grounds.[4] The courts' reasoning in these cases, as the United States correctly notes, was that ordinary deference could not be afforded to the jury's factual finding on acquittal where the jury necessarily simultaneously made a different and *inconsistent* factual finding on another count. *See* U.S. Br. at 14. This problem, however, simply does not arise where, as here, an acquittal coexists with a *mistrial*. In this case, the jury made only one relevant factual finding at petitioner's trial—it found that he did not participate in the conspiracy with which he was charged. Because the jury made no other factual finding which is inconsistent with that one, its verdict must be afforded its full weight as authority.[5]

Significantly, at least two of the cases cited by the United States expressly recognize that, in contrast to the situations presented in those cases, "an acquittal accompanied by a failure to reach a verdict may appro-

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[4] In *United States* v. *Bennett*, 836 F.2d 1314 (11th Cir.), *cert. denied*, 108 S.Ct. 2347 (1988), the court held that collateral estoppel did not bar defendant's retrial where he was acquitted on one count and the jury failed to reach a verdict on another. The basis of the court's decision, however, was that on the facts defendant's acquittal was not necessarily inconsistent with his conviction on the mistried count.

[5] In *United States* v. *Powell*, 469 U.S. 57 (1984), the Court reaffirmed that a conviction is not invalid simply because the jury simultaneously and inconsistently acquitted the defendant on another count. As the Court noted, "once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes . . . ." *Id.* at 67. In this case, the recognized interest in preserving the inviolability of jury verdicts counsels *in favor* of affording full collateral estoppel effect to petitioner's acquittal.

priately give rise to collateral estoppel if the acquittal necessarily determined facts in the defendant's favor." *United States* v. *Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *see also United States* v. *Price*, 750 F.2d 363, 365 (5th Cir.), *cert. denied*, 473 U.S. 904 (1985) ("defendant's argument would be stronger had the first jury mistried rather than having convicted him of the conspiracy charge"). In fact, the courts have acquitted consistently applied collateral estoppel principles where juries have acquitted defendants on one count and hung on another. *See United States* v. *Gornto*, 792 F.2d 1028, 1030-31 (11th Cir. 1986); *United States* v. *Mespoulede*, 597 F.2d 329, 336-37 (2d Cir. 1979). Thus, the doctrine of collateral estoppel plainly applies to this case.

The dangerous erosion of double jeopardy and collateral estoppel principle warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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